JOHN WILLIAM DAWSON & ANOR.

v.

WESTPAC BANKING CORP.

HIGH COURT, AUSTRALIA
MASON CJ
DEANE J
DAWSON J
TOOHEY
MC HUGH J
[F.C. 91/044]
12 DECEMBER 1991

CIVIL PROCEDURE: *Issue - Whether the Court of Appeal was in error in departing from findings of fact made by Court of first instance - The Court in granting special leave to appeal limited the appeal to that issue - The appellants sought to appeal on other grounds as well.*

On 16 March 1983 the second appellant (PTS) executed an equitable mortgage of land known as 312-314 in favour of the respondent (Westpac) as mortgagee to secure liabilities incurred and to be incurred by (ATWA) to Westpac. PTS was and is the proprietor of the land for an estate in fee simple, the title being old system (or general law) title. The land was and is PTS' principle asset; without it, PTS would have no valuable asset with which to carry on business. Affixed to the mortgage are the common seals, of PTS and ATWA. The common seal of each company was expressed to have been affixed, by authority of the board of directors previously given, in the presence of Mr. S who is described in each instance as the Secretary. Mr. S's signature appears adjacent to each common seal. In addition, the signature of Mrs. S as a director of PTS appears next to its common seal and the signature of Mr. G as a director of ATWA appears adjacent to its common seal.

Mr. D, the first appellant, was at all material times the holder of forty-nine of the 100 issued shares in PTS. The remaining shares in its capital were held by Mr. & Mrs. S. In an action brought by the appellants in the Supreme Court, Mr. D claimed that these shares were held in trust for him. In the first stage of the action, Hodgson J upheld the claim, removed Mr. & Mrs. S from office as directors of PTS and gave Mr. D control of the board of that company. Those aspects of the litigation were no longer in contention.

The matter before the Court as contended by the appellants' is that, in reversing the primary Judge's findings of fact, the Court of Appeal departed from well-established principles delimiting the approach to be taken by appellate Courts in relation to the findings of fact made by a Judge at first instance.

Held:

[1] To the extent that the Court of Appeal differed from the primary Judge, I would reject the appellants' contention that the Court of Appeal departed from settled principle. The finding that the notice was presented on 16 March was a matter of inescapable inference to be drawn from the documents without in any way drawing support from the oral testimony of Mr. S. Consequently, it was an inference which did not depend upon a departure from an assessment made by the primary Judge of the demeanour or credibility of witnesses. It was for the Court of Appeal to determine for itself the correct inference to be drawn, after giving respect and weight to the view of the primary Judge.

[2] I have reached conclusion that the primary Judge was mistaken in the approach which he took to this issue. The primary Judge's finding that the special resolution was invalid was made in a context where his Honour failed to take into account the existence of the presumption in favour of regularity and validity. The general rule is that, where an act is done which can only be done legally after the performance of some prior act, proof of the later act is presumptive evidence of that the prior act was done.

[3] The Court of Appeal was correct in holding that the primary Judge was in error in failing to perceive the true significance of the notice dated 14 March 1983 and that this error materially affected his approach to the making of crucial findings of fact. In this situation the Court of Appeal was justified in reviewing the primary Judge's findings.

[Appeal dismissed.]

Cases referred to:
Warren v. Coombes [1979] 142 CLR 531 ***(foll)***
Brunskill v. Sovereign Marine & General Insurance Co. Ltd. [1985] 59 ALJR 842;62 ALR 53 ***(cons)***
McLean Bros. & Rigg Ltd v. Grice [1906] 4 CLR 835 ***(foll)***
Northside Developments Pty. Ltd. v. Registrar-General [1990] 170 CLR 146
Whereat v. Duff [1973] 47 ALJR 540
Baumgartner v. Baumgartner [1987] 164 CLR 137

Legislation referred to:
Companies Act 1981 [NSW][Aust], s. 218
Conveyancing Act 1919 [NSW][Aust], ss. 7(1), 51A, (1)

For the appellants - M/s. Lane & Lane
For the respondents - M/s. Henry Davis York

JUDGMENT

Mason CJ:

The issue in this appeal is whether the New South Wales Court of Appeal was in error in departing from findings of fact made by Bryson J at first instance. This Court, in granting special leave to appeal, limited the appeal to that issue, although the appellants sought to appeal on other grounds as well. To identify the relevant findings of fact and to explain their significance and that of the findings made by the Court of Appeal, it is necessary to relate the history of the litigation.

On 16 March 1983 the second appellant, Premium Tyre Service Pty. Ltd. (PTS), executed an equitable mortgage of land known as 312-314 (since renumbered 144-150) Princes Highway, Dapto, in favour of the respondent (Westpac) as mortgagee to secure liabilities incurred and to be incurred by ATWA Trading Pty. Ltd. (ATWA), to Westpac. PTS was and is the proprietor of the land for an estate in fee simple, the title being old system (or general law) title. The land was and is PTS's principal asset; without it, PTS would have no valuable asset with which to carry on business. Affixed to the mortgage are the common seals of PTS and ATWA. The common seal of each company was expressed to have been affixed, by authority of the board of directors previously given, in the presence of Mr. Smith who is described, in each instance, as the "secretary". Mr. Smith's signature appears adjacent to each common seal. In addition, the signature of Mrs. Smith as a director of PTS appears next to its common seal and the signature of Mr. Grant as a director of ATWA appears adjacent to its common seal.

Mr. Dawson, the first appellant, was at all material times the holder of forty-nine of the 100 issued shares in PTS. The remaining shares in its capital were held by Mr. & Mrs. Smith. In an action brought by the appellants in the Supreme Court, Mr. Dawson claimed that these shares were held in trust for him. In the first stage of the action, Hodgson J upheld this claim, removed Mr. & Mrs. Smith from office as directors of PTS and gave Mr. Dawson control of the board of that company. Those aspects of the litigation are no longer in contention.

What is presently relevant is that, in the action, the appellants also claimed that the mortgage was executed without the authority of the board of directors of PTS in order to serve the interests of ATWA, a company owned and controlled by Mr. Smith and his associates, in which Mr. Dawson had no interest whatsoever, in circumstances where the giving of the mortgage did not advance any interest of PTS. The appellants contended that Westpac was not entitled to rely on the protection conferred by s. 51A of the Conveyancing Act 1919 (NSW) by reason of Westpac's knowledge of deficiencies in the steps leading to the affixation of the seal. The appellants also claimed that, when the mortgage was executed, the debtor whose debt was to be secured, ATWA, was not then in existence or that there was an invalidating mistake in relation to its existence or identity. As against Westpac the appellants sought a declaration that the mortgage was void and of no effect.

It appears that the execution of the mortgage arose out of a business venture entered into by Mr. Smith and his associates. They had been engaged in the business of buying and selling tyres. Mr. Smith proposed that tyres should be imported from Japan and sold in Australia through a company to be selected by him. One of the companies with which he was associated was Tire Warehouse (Australia) Pty. Ltd. (Tire). In late 1982 or early 1983, Tire sought a loan from Westpac in connection with the importation of tyres from Japan. Ultimately Westpac agreed on condition that PTS should provide a third party security and that its directors should give guarantees. However, on 25 February 1983, the directors of Tire resolved that it should cease trading. On 25 March 1983, Mr. Mathieson, the Dapto branch manager of Westpac, noted that there was a "[t]ransfer of commitments in [the] name of [Tire] to a newly formed Company [ATWA]". On 1 March 1983, Westpac had opened a new account in the name of ATWA and a transfer of $426.27 was made from the existing account of Tire to the new account. Thereafter, the account was debited and credited with various amounts, though Tire became inactive after the resolution to cease trading.

Westpac had agreed to lend money to finance the venture on the security of a mortgage of the land owned by PTS. Westpac maintained that the company selected by Mr. Smith as the vehicle for the venture was Premium Tyre Service (Earthmoving Division) Pty. Ltd. (PTSEMD). It was incorporated by that name on 29 July 1974. By 1983 it had been inactive for most, if not all, of its corporate existence. PTSEMD changed its name to ATWA but the change took effect only on 27 July 1983, as the certificate of incorporation which issued on the change of name stated.

With respect to the appellant's contention that the common seal of PTS was not affixed to the mortgage so as to bind that company, the primary Judge (Bryson J) inferred that, at the relevant time, Mr. Dawson, Mr. Smith and Mrs. Smith were the directors of PTS but that the board of directors had not authorized the common seal of that company to be affixed to the mortgage. He found, accordingly, that PTS was not bound by the unauthorized use of its seal. However, he went on to hold that Westpac was entitled to the protection given by s. 5lA (1) of the Conveyancing Act on the ground that Westpac was a purchaser within the meaning of s. 51A(l) as defined by s. 7(1) and that it had acted in good faith in treating Mr. and Mrs. Smith as secretary and director of PTS when they attested the execution of the mortgage by PTS.

With respect to the appellants' second basic contention that the debtor corporation ATWA was not an existing corporation at the time its purported seal was affixed to the mortgage, Bryson J found in favour of the appellants in the light of the facts, as I have related them, concerning PTSEMD's change of name. His Honour said:

> As the debtor was fictitious there are no liabilities, the mortgage secured nothing and the bank cannot enforce it.

However, his Honour acknowledged that the position would be different if Westpac could establish two other matters. The primary Judge's findings of fact, the subject of the present appeal, are relevant to the first of these two matters.

Bryson J, after observing:

> The *prima facie* position, to which I should give effect unless the bank discharges the burden of showing some other position, is that there was no debtor [other than ATWA] whose debts the mortgage could support,

went on to say:

> It would be necessary ... for the bank to establish two things if it were to associate debts due to it by any customer or other person with a charge created by this mortgage. The first would be that the bank should establish that it was the common intention of the persons who were parties to the mortgage that the name ATWA should be used to identify some person whom the parties intended should be the debtor, should give the contractual undertakings given by the debtor, should be taken to have executed the document and generally should be the party referred to by that name. It is difficult not to lapse into circularity but the individuals who were the relevant directing minds of PTS, the bank and the debtor should all have had the same corporation in mind as the debtor... The strong inherent improbability as a matter of fact that a bank or a bank officer would knowingly enter into a mortgage referring to the bank's customer by a name other than its real name and bearing a seal... other than its real seal is immediately and strikingly obvious.
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> The second would be that the bank should establish that actual execution of the mortgage by the debtor under its common seal was unnecessary; plainly the debtor did not execute the mortgage under its common seal.

What I understand his Honour to have been saying was that, notwithstanding his *prima facie* conclusion that there was no debtor other than ATWA whose debts the mortgage could support, Westpac could succeed if it could establish:

(1) an intention common to the parties to the mortgage that the mortgage was to secure the debts of a particular identified debtor, say PTSEMD, even though it was agreed that it was to be called ATWA, and

(2) that execution of the mortgage by the debtor under its official common seal was not essential to make the mortgage binding on the parties to the mortgage.

As appears from the concluding sentence in the first paragraph of the passage last quoted, Bryson J appears to have found against Westpac on the first of the two issues and did not proceed to consider the second issue. The Court of Appeal found in favour of Westpac on the two issues.

It is the Court of Appeal's reversal of the primary Judge's findings of fact relevant to the first issue that is the subject of the present appeal. The appellants case is that, in reversing the primary Judge's findings of fact, the Court of Appeal departed from well-established principles delimiting the approach to be taken by appellate Courts in relation to the findings of fact made by a Judge at first instance.

In the Court of Appeal, Mahoney JA (with whom Samuels and Meagher JJA agreed) held, assuming PTSEMD to have been the intended debtor, that the execution of the mortgage by that company by means of the affixation of a seal not being its seal did not render execution of the mortgage ineffective. Furthermore, his Honour concluded that the new seal showing the name "ATWA" was intended to be PTSEMD's seal, to be used when the company changed its name. Although the company owned two seals, its original seal and the new seal, his Honour inferred that the new seal was to become the company seal when its name was formally changed. His Honour also inferred that the directors followed a formal procedure laid down as the method of execution of a deed by a company, using a seal which it owned, not being the seal which the Companies Act 1981 (NSW) s. 218 and the Articles of Association required it to have. The seal was affixed with the intention that there should be a sealing of the document. Mahoney JA considered that the use of the ATWA seal in these circumstances was no more than an irregularity which did not go to the validity of the execution of the mortgage. To quote his Honour:

> [T]he company intended that the proper procedure be followed and the error lay in the accidental use of one seal rather than another. In my opinion that did not render ineffective the execution of the document under seal by the company.

The next and, for present purposes, the critical step in the reasoning of the Court of Appeal was to deal with the appellants' argument that there was a mistake in the identity of the company to which Westpac was to advance the money. Mahoney JA acknowledged that Mr. Smith, who conducted the negotiations with Westpac, initially intended that Tire would import the tyres from Japan and borrow the money. Indeed, it was even proposed that Tire should change its name to ATWA. However, because persons other than Mr. and Mrs. Smith held shares in the relevant companies, PTSEMD was selected in lieu of Tire as the company to import the tyres from Japan and borrow the money from Westpac. Mahoney JA stated that this was "not really in contest". What was in contest was when that choice was made.

In concluding that the choice was made before 16 March 1983, Mahoney JA placed much reliance on the documents relating to the change of name from PTSEMD to ATWA, in particular, a form of "notice of resolution" dated 14 March 1983 to the National Companies and Securities Commission stating that on 4 March 1983 a general meeting of PTSEMD resolved that the company's name be changed to ATWA. His Honour said: "I am satisfied that the notice of resolution was prepared on or about 14 March 1983 and was lodged on 16 March 1983". Furthermore, his Honour considered that "the probability is that such a meeting was held". In this respect, he rejected the appellants' argument that the documents had been prepared after the dates they bore and that they were backdated and a further argument that the selection of PTSEMD as the relevant company was not effectively made until after the mortgage was executed.

Mr. Mathieson, the Dapto branch manager of Westpac, believed that the company to whom the advances should be made would bear the name ATWA. Initially he believed that the company was Tire but, as noted previously, in a memorandum dated 25 March 1983, he referred to a transfer of commitments from Tire "to a newly formed Company ATWA". Mahoney JA, after referring to Mr. Mathieson' s evidence concluded that there was, at the least, confusion in Mr. Mathieson's mind and a failure to understand the difference between "a newly formed company" and a company whose name had been changed. His Honour went on to say:

> The proper conclusion is, in my opinion, that Mr. Mathieson thought that the company the party to the transaction was 'a newly formed company' bearing the ATWA name and that it was separate from and to be 'consistently monitored' with [Tire].

> If this was his belief then I would infer that Mr. Mathieson believed the new company to have been in existence at the time when the mortgage was executed ...
>
> [T]he mistake under which Mr. Mathieson and the bank laboured at the time of execution of the mortgage was that they thought the ATWA company which had executed it was a newly formed company whereas it was in fact an existing company [PTSEMD] which had resolved that its name be changed.

This line of reasoning led to the conclusion that the mistake did not render the transaction initially void. But we are not concerned in this appeal with the correctness of that conclusion.

The appellants contend that the Court of Appeal was in error in reversing the findings of fact made by Bryson J and, in particular, in reversing findings of fact based on the credibility of witnesses. It is necessary to identify what were the relevant findings of fact made by the primary Judge. Bryson J found, on the balance of probabilities, that no decision had been taken by anyone, even Mr. Smith himself, that PTSEMD's name would be changed to ATWA on 4 March 1983 or at any time before 16 March 1983. In reaching that conclusion, Bryson J was unable to place reliance on the written materials or on the oral testimony of Mr. Smith and Mr Mathieson. His Honour said of the absence of narration of events of central importance by the principal actors in the transactions:

> This was strange in a case where much of what I was shown in writing was irregular. The principal actors Mr. Smith and Mr. Mathieson both proved unable to give any convincing narration of important events in which they participated; whether this was by failure of memory, lack of understanding of what they were doing at the time or some other reason, their oral accounts of the events are of little weight or clarity. For some important events no attempt was made to obtain their narrations.

The last sentence in the passage just quoted applies to the absence of specific evidence from Mr. Smith about the meeting on 4 March 1983 referred to in the notice of resolution dated 14 March and at which the special resolution for the change of name from PTSEMD to ATWA was said to have been passed. The notice was signed by Mr. Smith. His Honour described it as "a very suspicious document". There was no evidence of a minute of the resolution for change of name recorded in the notice nor was there "any substantial evidence that such a general meeting took place", to quote his Honour's words. In his evidence in chief Mr. Smith was not asked anything about the meeting. In cross-examination his evidence about the date of the change of name was confused. Asked whether PTSEMD still existed as a company by that name as at 16 March 1983, his answer was "I believe so". Asked then when ATWA came into existence as a company by that name, he said:

> I believe around about that time, it might have been prior - On dates - I really don't know.

The cross-examination continued in this way:

> Q. Was it your belief at that time that the company had come into existence by that name because Premium Tyre Service (Earthmoving Division) Pty. Ltd., had changed its name to ATWA or for some other reason? A. It was believed that Earthmoving Division was going to be changed to ATWA the exact dates I really can't.

Later in cross-examination Mr. Smith was asked specific questions about the alleged meeting on 4 March 1983. When shown the notice dated 14 March 1983 his answer was that he could not remember whether a meeting of members of PTSEMD had been held on that day. Shortly afterwards he was asked these questions and gave these answers:

> (His Honour:)

Q. (D)o you remember any group of people attending a meeting of members of Premium Tyre Service (Earth Moving Division) on 4 March 1983?

A. No.

White:...

Q. There was no meeting whatsoever held on 4 March; you signed this document because it was put in front of you to be signed, by your then accountants?

A. It may have been.

Although the primary Judge did not refer to these questions and answers, they support his comments concerning the absence of evidence by Mr. Smith as to the holding of the meeting and the passing of the special resolution.

Mr. Smith was equally vague when questioned about the date when the decision was made to change the name of PTSEMD, rather than Tire, to ATWA. But he gave evidence to suggest that, notwithstanding the resolution on 25 February to cease trading, on 28 February 1983 Tire was acting on the footing that its name was to be changed to ATWA. The following questions and answers are taken from his cross-examination:

Mr. White:

Q. Looking at Ex. O dated 28 February 1983, that is signed by you?

A. Yes.

Q. That is a notice to customers informing them that in the past they have known you as (Tire) Warehouse Australia Pty. Ltd., and you were informing them that you had changed your company name to ATWA Trading Pty. Ltd., is that correct?

A. Yes.

Q. So that certainly as at 28 February 1983 the intention was that the name [Tire] Warehouse Pty. Ltd., be changed to ATWA Trading, is that right?

A. I believe so.

Mr. Smith also gave evidence that as late as 9 March 1983 Tire was invoicing Ohtsu tyres from Japan under the heading ATWA Pty. Ltd. to PTSEMD. According to Mr. Smith, that came about because Tire had changed its name to ATWA. In that respect the following answer by Mr. Smith is of significance:

Q... And it was I think around about 28 February 1983 that you notified that [Tire] Warehouse was going to change its name to ATWA, do you recall that or would you like to see those exhibits again?

A. I think that's correct, yes.

In rejecting the contention that the members of PTSEMD had passed a resolution on 4 March 1983 changing its name to ATWA, Bryson J also relied on a notice dated 6 April 1983 lodged with the Corporate Affair Commission on 2 May 1983 of particulars of a charge created by PTSEMD on 6 April 1983 using its original name in favour of A.G.C. (Advances) Limited. The charge purported to be signed by Mrs. Smith as director and Mr. Smith as secretary. In the notice Mr. Smith certified that the charge was created on 6 April 1983. The primary Judge regarded the document as making it:

to a marked degree improbable that PTSEMD had, in the belief of Mr. Smith, and also that it had in any way adopted he name ATWA by 6 April 1983, and also that it was treating itself as so named in the course of its business, and also that it had in any way adopted a common seal bearing that name.

His Honour continued:

> These documents are important for my general view of Mr. Smith as a very unreliable source for information in detail relating to the affairs of companies. His documents are usually dubious, and his oral evidence and his demeanour while giving it are also bases for this view. The statement purportedly made by him to the effect that there was a special resolution of members to change PTSEMD's name on 4 March does not, on the balance of probabilities, persuade me that in fact any decision was taken by members or anybody, even by Mr. Smith himself, that PTSEMD's name would be changed to ATWA either on 4 March or at any time before 16 March 1983. Nor do I have any confidence in the date 14 March 1983 on which Mr. Smith purportedly signed Ex. L. It is improbable that this document was signed as early as 14 March 1983 and it is improbable that there was any project of changing the name of PTSEMD to ATWA on or before 16 March 1983. There plainly was a project of using ATWA as the name of some new entity, but I do not find that at that time this intention related to PTSEMD.
>
> I could not on the evidence find that Mr. Smith had the same intention and belief as hereinafter I find that Mr. Mathieson had that PTS and the bank should enter into legal relations with a newly formed company named ATWA. Plainly Mr. Smith did not have that intention, and he did not have any intentions which coincided with those of Mr. Mathieson.

In the light of his comment about the reliability of the companies' documents and the oral testimony, especially that of Mr. Smith as well as the general uncertainty concerning the date when it was decided to change PTSEMD'lc name, in lieu of that of Tire, to ATWA, it was understandable that Bryson J was not inclined to attach much weight to the statement by Mr. Smith in the notice dated 14 March 1983 of the special resolution with respect to PTSEMD's change of name. His Honour went further, not being persuaded that it was signed on 14 March 1983, and finding that, as it was not lodged until 16 March 1983, no one is likely to have believed on 16 March 1983 that it had already been given effect to.

As we have seen, the Court of Appeal took a very different view of the notice and the documents with which it was associated. Plainly enough, it was that different view which persuaded the Court of Appeal to the conclusion that the primary Judge was wrong. So it is necessary to determine whether the primary Judge was mistaken about the significance of the notice and associated documents.

The notice dated 14 march is Companies Form 24 which is appropriate for a special resolution changing the corporate name. It records that the resolution changing the name of PTSEMD to ATWA was passed on 4 March 1983. The notice has stamped upon it "Presented" with the handwritten notation "16 March 1983". However, at the foot of the form in the space provided under the printed words "Lodged with the Commission" there is the imprint of a stamp:

> On 27 July 1983 At Sydney
> N. Murphy
> Authorised Officer.

In the body of the form there is the imprint of another stamp:

> Change Of Name Approved
> Registered Pursuant To s. 65 (1)
> Former Name Cancelled
> On 27 July 1983 At Sydney
> N. Murphy
> Authorised Officer.

At the foot of the document in a space reserved for particulars of the person lodging the document there appears the names "H. Charles and S.C. Brigden Level 12 182 George St Sydney 2000". These particulars have been crossed out and there has been substituted the following:

C.K. Millar, Son & Partners
P.O. Box 28
Cronulla 2230

Two other matters to be noticed are that the notice has been given Document Number 004246 and that it bears the notation in handwriting "$55".

Also lodged with the commission on 27 July 1983 was a form of consent by Tire to the use of the ATWA name. This document was evidently lodged contemporaneously with PTSEMD's notice dated 14 March to enable that company to secure approval of its change of name to ATWA. It seems that when Tire proposed to change its name to ATWA it had reserved that name, so its consent was required before approval was given to the use of name by PTSEMD.

Just what the "presented" stamp indicates on the notice dated 14 March is by no means clear. In argument before the Court of Appeal, Counsel were unable to state whether it was the practice of the Commission to use such a stamp. And there was no evidence as to the meaning of the stamp. However, in the Court of Appeal, Counsel for the appellants conceded that the number "004246" on the notice dated 14 March was the same number appearing on a receipt dated 18 March issued by the Commission for an amount of $61. The receipt refers to F24 (presumably Form 24) and under the heading "lodged by/Company" there appears the name "Premium Tyre Service Earth Moving Division". No doubt the reference is to the company by that name. The receipt also refers to H. Charles and S.C. Brigden as the person from whom the payment was received but that reference was crossed out.

Mr. MacFarlan QC for the respondent explained the apparent discrepancy between the "$55" noted on the notice and the "$61" in the receipt by saying that the filing fee on Form 24 was $50, the cost of a copy of a certificate of incorporation on change of name was $5 and stamp duty on such a certificate was $6. The amount of stamp duty would not have been included in the amount noted on the Form 24 notice.

In the absence of oral evidence explaining what happened to the notice, that is, whether it was "presented" to the Commission on 16 March, whether it was then uplifted and subsequently "lodged" with the Commission on 27 July, it is not easy to be certain about the entire significance of the documents. It seems that the Commission had raised a difficulty about PTSEMD's change of name arising from an earlier request that the company be "struck off" the register. That circumstance might well explain why a delay ensued between March and July.

Be that as it may, it is an irresistible inference that this notice dated 14 March was presented to the Commission on 16 March or thereabouts. The Commission's receipt dated 18 March refers specifically to the number which the notice bears and described it by reference to "F24", the form appropriate to a notice of change of name. What is more, the amounts noted on the notice and in the receipt point to the presentation or lodgment of such a notice. It may be that the Court of Appeal was mistaken in saying that the notice was "lodged" rather than "presented" on 16 March but that mistake, if it be a mistake, is of little, if any, significance. For present purposes, what is important in this respect is that the Court of Appeal was correct in perceiving something that eluded the primary Judge, namely, that the

notice dated 14 March was a document that was already in existence when it was presented to the Commission on 16 March. It could not be simply dismissed, as the primary Judge sought to dismiss it, as a document that may have been brought into existence at a later date, in conformity with his view that no decision to change PTSEMD's name to ATWA had been taken at that time.

To the extent that the Court of Appeal differed from the primary Judge on this point, I would reject the appellants' contention that the Court of Appeal departed from settled principle. The finding that the notice was presented on 16 March was a matter of inescapable inference to be drawn from the documents without in any way drawing support from the oral testimony of Mr. Smith. Consequently, it was an inference which did not depend upon a departure from an assessment made by the primary Judge of the demeanour or credibility of witness. In accordance with the decision in *Warren v. Coombes* [1979] 142 CLR 531, it was for the Court of Appeal to determine for itself the correct inference to be drawn, after giving respect and weight to the view of the primary Judge.

However, the Court of Appeal went further in holding that a general meeting of PTSEMD was held on 4 March at which a special resolution for the change of name of ATWA passed. There was simply no basis at all for this finding of fact. In the first place, there was no evidence that such a meeting was held. No such evidence was given by Mr. Smith who might have been expected to depose to the meeting had it taken place. Secondly, all that Mr. Smith said was that he believed that the change of name took place at "about that time, it might have been prior - On dates - I really don't know". Such a vague statement could not sustain the Court of Appeal's reversal of Bryson J's finding, especially when account is taken of his Honour's extremely adverse view of the credibility of Mr. Smith as a witness. In this respect the Court of Appeal failed to respect the established principle that an appellate Court should not depart from a finding of fact made by a tribunal of fact which is based on the demeanour or credibility of witnesses unless the finding of fact is inconsistent with admitted or proved facts or is "glaringly improbable" - *Brunskill v. Sovereign Marine & General Insurance Co. Ltd.* [1985] 59 ALJR 842, at p. 844, 62 ALR 53, at p. 57. Furthermore, the Court of Appeal disregarded the finding of the primary Judge that the document's of the companies were unreliable. That finding was firmly based on the evidence and there was no justification for departing from it.

On the other hand, and this is of more importance to the outcome of the appeal, I have reached the conclusion that the primary Judge was mistaken in the approach which he took to this issue. The primary Judge's finding that the special resolution was invalid was made in a context where his Honour failed to take into account the existence of the presumption in favour of regularity and validity. Registration of the change of name was effective as from 27 July 1983. That registration was based on an acceptance of the efficacy or presumed efficacy of the special resolution recorded in the notice. There was in this situation a strong presumption of regularity and validity which would, if it were not rebutted, justify a finding that the meeting was held and the resolution was passed. The general rule is that, where an act is done which can only be done legally after the performance of some prior act, proof of the later act is presumptive evidence that the prior act was done. In *McLean Bros. & Rigg Ltd. v. Grice* [1906] 4 CLR 835 this Court held that, where there existed a record in writing of an extraordinary resolution passed for the voluntary winding up of a company, signed by the chairman of the meeting at which it was passed, a copy of which was sent to the Registrar-General and recorded by him and was also published in the Government Gazehe, there was a rebuttable presumption that all that took place at the meeting was done lawfully.

Such a rebuttable presumption arose here from the change of name based on the notice signed by Mr. Smith recording the passing of the special resolution at the meeting said to have been held on 4 March. That presumption did not depend upon an acceptance of Mr. Smith's oral testimony.

The primary Judge found that no meeting took place without taking the presumption into account. In doing so, he disregarded the notice of 14 March as a document which was not genuine because he failed to perceive the significance of the receipt of 18 March and the light that it threw on the existence of the notice as at 16 March.

There is no direct evidence which controverted the holding of a meeting on 4 March or the passage at that meeting of the special resolution for the change of name from PTSEMD to ATWA. The principal evidence from which the primary Judge drew a contrary inference was, first, the intention of Tire to use the ATWA name, an intention which was implemented by Tire invoicing tyres under the ATWA name to PTSEMD until 9 March 1983 and, secondly, the use by PTSEMD of its original name in connection with the charge created on 6 April 1983 in favour of A.G.C. (Advances) Ltd. But neither the primary Judge nor the Court of Appeal considered whether these matters were sufficient to rebut the presumption of regularity. It is, in my view, evident that the Court of Appeal would not have regarded these matters as being sufficient to rebut the presumption. That much at least must follow from the significance which the Court of Appeal attached to the authenticity of the notice dated 14 March.

In one sense this Court is not directly concerned with the validity of the special resolution or the meeting. In light of the approach taken by the Court of Appeal, our concern is with the intention of PTSEMD (and that is relevantly the intention of Mr. Smith and Mrs. Smith), and of Westpac, with respect to its name and the ATWA seal. So long as the notice dated 14 March is genuine in sofar as it was not backdated, it evidences a contemporaneous intention to change PTSEMD's name to ATWA and supports the Court of Appeal's inference that the persons then in control of that company intended that the ATWA seal should become PTSEMD's official seal when its name was formally changed. It is an inescapable inference that, when the notice of change of name was lodged on 16 March and the equitable mortgage was executed by PTS on that very day, the persons participating in the transaction, including Mr. and Mrs. Smith, believed that the name of PTSEMD had been, or was being, changed to ATWA and that it would be appropriate to affix the ATWA seal to a document to be executed by the company which had been known as PTSEMD. There seems to be no solid reason to doubt that the mortgage was given to secure the debts and liabilities of PTSEMD which was the company whose name had been or was then being changed to ATWA and which was the only company in the group with debts owing to Westpac which could support the giving of a mortgage to Westpac. The subsequent use by PTSEMD of its original seal on a charge dated 6 April 1983 in favour of A.G.C. (Advances) Ltd. is no doubt to be explained by reference to the difficulties which arose in securing the Commission's approval to the change of name to ATWA and to a realization that the change had not been approved by that date.

In the ultimate analysis the Court of Appeal was correct in holding that the primary Judge was in error in failing to perceive the true significance of the notice dated 14 March 1983 and that this error materially affected his approach to the making of crucial findings of fact. In this situation the Court of Appeal was justified in reviewing the primary Judge's findings. Although I do not agree with the way in which the Court of Appeal arrived at the conclusion that a meeting took place on 4 March 1983 and the special resolution or the change of name was passed on that day, I would not disturb that conclusion. In other respects, I would affirm the Court of Appeal's findings of fact.

I would dismiss the appeal.

Deane J:

I agree with the judgment of the Chief Justice.

The learned trial Judge came to the conclusion that, to quote his words, there was "no evidence either way for or against concluding that the Form 24 (which would relate to a change of name) which according to Exh. 29 was lodged by PTSEMD [that is Premium Tyre Service (Earthmoving Division) Pty. Ltd.] on 18 March 1983 related to a change of the company's name to ATWA Trading Pty. Ltd.; the contents of that Form 24 are quite unknown". In fact, as was effectively conceded by Counsel for the appellant in the Court of Appeal, the National Companies and Securities Commission's (the NCSC) identification number (004246) on each document makes plain that the receipt of 18 March 1983 (Exhibit 29) related to Exhibit L which had been "presented" to the NCSC on 16 March 1983 and which was a "Form 24" which recorded that a special resolution changing the name of PTSEMD to ATWA Trading Pty. Ltd., had been "duly passed" at a general meeting of that company "duly convened and held... on 4 March 1983". Once the relationship between Exhibit L and Exhibit 29 is appreciated, it is obvious that the learned trial Judge was mistaken and that the evidence compelled the finding that the Form 24 referred to in Exhibit 29 related to a change of PTSEMD's name to ATWA Trading Pty. Ltd.

If the connection between Exhibit 29 and Exhibit L had been brought to the attention of the learned trial Judge, his Honour could not have concluded that it was "to a marked degree improbable that PTSEMD... had in any way adopted the name ATWA by 6 April 1983". His Honour's failure to recognize that the evidence effectively compelled the conclusion that a notice recording that PTSEMD had changed its name by special resolution at a general meeting held on 4 March 1983 had been presented to the NCSC on 16 March 1983 also vitiated his conclusion that "Mr Smith did not intend", by the mortgage of 16 March 1983 in the name of ATWA, "that (Premium Tyre Service Pty. Ltd.) and the bank should enter... into legal relations with PTSEMD". That being so, the argument that the Court of Appeal departed from settled principle in interfering, to the extent that it did, with the learned trial Judge's findings of fact is, in my view, untenable. Indeed, once the relationship between Exhibit L and Exhibit 29 is appreciated, it appears to me that, for the reasons given by the Chief Justice, the ultimate findings of the Court of Appeal were inevitable.

Dawson & Toohey JJ:

This appeal turns on the proposition that, in setting aside the decision of the trial Judge in favour of the present appellants, the Court of Appeal of New South Wales ignored findings made by the trial Judge and, without justification, substituted findings of its own for those of the trial Judge. For these reasons, the appellants contend, the decision of the trial Judge should be restored.

The appellants brought action against the present respondent (and against other defendants who were not parties to the appeal to the Court of Appeal and are not parties to the present appeal) seeking, *inter alia*, a declaration that a mortgage granted by the second appellant Premium Tyre Service Pty. Ltd. (PTS), to the respondent Westpac Banking Corporation (Westpac) was null and void. The first appellant (Mr. Dawson) was at all relevant times the holder of forty-nine of the one hundred shares issued in PTS.

PTS is the registered proprietor of land on Princes Highway, Dapto. The street numbers were originally 312-314; in 1984 they were renumbered as 144-150. The land is PTS's major asset and from there it carries on business as a retailer of motor vehicles and truck tyres. In March

1983 the directors of PTS were Mr. Dawson and Mr. and Mrs. Smith. For reasons that will appear, Bryson J held the mortgage to Westpac to be void and of no force or effect. The appellants' claim for damages and costs against the Smiths was reserved for further consideration. It was the Smiths, in particular Mr. Smith, who were responsible for the execution of the mortgage from PTS to Westpac, the validity of which is now in contention.

The title to the land is under the general law or old system. The mortgage is an equitable mortgage as PTS had earlier mortgaged the land to Westpac to secure its own obligations to the bank. The mortgage in contention was given to secure obligations incurred and to be incurred by ATWA Trading Pty. Ltd. (ATWA). The mortgage is dated 16 March 1983 and was registered in the General Register of Deeds on 5 January 1984. The mortgage carries the common seal of both PTS and ATWA. In each case the common seal of the company is expressed to have been affixed by authority of the board of directors previously given in the presence of Mr. Smith who, in each case, is referred to as "Secretary". In the case of PTS, the mortgage additionally carries the signature of Mrs. Smith as a director.

The statement of claim alleges (and these allegations are not really in dispute as between the appellants and the respondent) that Mr. Dawson was not aware of nor did he authorise the affixing of the common seal of PTS to the mortgage; that the common seal of PTS was not affixed to the mortgage by the authority of the board of directors; and that the Smiths affixed and attested to the affixation of the common seal of PTS to the mortgage with a view to securing the liabilities of ATWA in which they were interested and in which the appellants had no interest and so as to fraudulently conceal from Mr. Dawson the giving of security to Westpac over the land.

The appellants' attack on the mortgage transaction was made in two ways. Underlying both attacks was the proposition that the appellants had no interest in ATWA and that PTS's land was used, without their consent, to assist ATWA and without any benefit to them.

The first attack was on the effectiveness of the purported mortgage under the common seal of PTS and on Westpac's entitlement to rely on that execution, having regard to what was said to be the bank's knowledge of deficiencies in the steps pursuant to which the seal was affixed. The second attack was based on the contention that when the mortgage was given the principal debtor, ATWA, whose debt was to be secured by the mortgage was not then in existence, and that the seal bearing the words "ATWA Trading Pty. Ltd., Common Seal" was not the common seal of any corporation.

Bryson J thought that the matter could be disposed of quite simply. He said: "As the debtor was fictitious there are no liabilities, the mortgage secured nothing and the bank cannot enforce it". However, his Honour continued: "The parties conducted this litigation in an elaborate way as if the true issues were more complex than this, and I will deal with what they put before me". He then went on to deal, in a lengthy judgment, with these other arguments advanced by the parties. But, as can be seen, the way in which his Honour thought the matter should be disposed of involved an acceptance of the appellants' second attack on the mortgage, namely, that ATWA was not in existence at the time the mortgage was given and that there was no company, hence no liabilities which the mortgage could secure. It was this aspect of the matter that was argued on appeal to this Court.

To assess the way in which Bryson J thought that the matter could be disposed of, it is necessary to say something as to when and in what circumstances ATWA came into existence. Mr. Smith had in mind to start a business involving the importation of tyres from

Japan and their sale in Australia. He proposed to do this through a company he would select. He needed finance for this business. At the time he was associated with a number of companies. One was PTS. Another was Tire Warehouse (Australia) Pty. Ltd. (Tire). In late 1982 or early 1983 Tire sought a loan from Westpac in connection with a proposal to import tyres from Japan. At first Westpac refused the application, but later it gave approval subject to conditions, one of which was that PTS provide a "third party security" and that its directors should give appropriate guarantees. While Tire's application was being considered by the bank, changes took place in regard to that company. At a meeting of the directors of Tire, held on 25 February 1983, the directors resolved that the company should cease trading. In a memorandum dated 25 March 1983, the manager of Westpac's branch at Dapto, Mr. Mathieson, noted that there was to be "[t]ransfer of commitments in name of Tire Warehouse (Australia) Pty. Ltd., to a newly formed Company ATWA Trading Pty. Ltd.". On 1 March 1983 Westpac had opened a new account in the name of ATWA and a transfer of $426.27 was made from the existing account of Tire to the new account. From 2 March 1983 the ATWA account was credited and debited with particular amounts although, at that time, no company of that name was in existence. Tire itself seems to have dropped out of the picture once its directors resolved to cease trading.

However, there was a submission made on behalf of Westpac that on 4 March 1983 a meeting was held of a company called Premium Tyre Service (Earthmoving Division) Pty. Ltd. (which we shall refer to as "Earthmoving", the abbreviation used in the judgment of the Court of Appeal; Bryson J referred to it as "PTSEMD") and that at the meeting a special resolution was passed in the following terms:

> That the name of the company be changed from Premium Tyre Service (Earth Moving Division) Pty. Ltd. to ATWA Trading Pty. Ltd.

Westpac relied on the occurrence of that meeting to show how ATWA came into existence.

There was some documentary evidence which, in the opinion of the Court of Appeal, supported a conclusion that statutory notice of such a resolution was presented to the National Companies and Securities Commission (the Commission) on 16 March 1983 but that the resolution was not then registered, apparently because there had been a request that Earthmoving be struck off the Register of Companies. Eventually, the notice of resolution was "approved" and "registered pursuant to s. 65(1)" of the Companies Act 1981 (NSW). It was the appellants' contention that the resolution of change of name did not take effect until 27 July 1983, some time after the purported execution of the mortgage.

It is apparent from the judgment of Bryson J that his Honour gave little credence to the evidence of Mr. Mathieson, Westpac's branch manager, and even less credence to that of Mr. Smith. As to the meeting at which Earthmoving's name was said to have been changed to ATWA, Bryson J commented that:

> If Mr. Smith had given evidence establishing affirmatively that... there had been a general meeting at the time and place referred to and that a special resolution had been passed,... the first steps might have been taken towards investigating and establishing those facts; he would have exposed himself to cross-examination and other evidence with respect to them.

His Honour continued:

> He did not give such evidence; it is quite improbable that there ever was any such meeting or resolution and Mr. Smith's documents about the affairs of companies appear in many places to be unreliable.

Later in his judgment, his Honour said of Mr Smith:

> His documents are usually dubious, and his oral evidence and his demeanour while giving it are also bases for this view. The statement purpotedly made by him to the effect that there was a special resolution of members to change PTSEMD's name on 4 March does not, on the balance of probabilities, persuade me that in fact any decisions was taken by members or by anybody, even by Mr. Smith himself, that PTSEMD's name would be changed to ATWA either on 4 March or at any time before 16 March 1983.

It will be necessary to say more about the "documents" for they were the basis for a contrary conclusion reached by Mahoney JA (with whom Samuels and Meagher JJA agreed) regarding the change of name and the coming into existence of ATWA. The comments of Bryson J, to which we have just referred, were made in a context in which a number of documents were tendered in opening, apparently without adequate explanation from any witness, then or later, as to their significance.

The appellants' principal complaint was that, notwithstanding the highly adverse view taken by Bryson J of Westpac's main witnesses, Mathieson and Smith, Mahoney JA said that he was "satisfied that Mr. Smith and those acting for Earthmoving determined that Earthmoving should be the company to enter into the transaction before 16 March 1983". Mahoney JA regarded the significant evidence in this regard as "that relating to the change of name of Earthmoving to ATWA". His Honour was referring to the documents in evidence purporting to show that on 4 March 1983, at a general meeting of Earthmoving, a special resolution was passed to change its name to ATWA. "And", said Mahoney JA, "the documentation relating to the execution of the mortgage suggest that it was the company that was Earthmoving and became ATWA which was intended to be the party to the mortgage". His Honour rejected a submission by Counsel for the present appellants that the documents had been prepared after the dates they bore and that they were backdated and he rejected a further submission that the selection of Earthmoving as the relevant company was not effectively made until after the mortgage was executed.

The conclusions reached by Mahoney JA are sharply at odds with those of the trial Judge. Reference has already been made to Bryson J's conclusion that it was quite improbable that there had ever been a meeting of Earthmoving as alleged or that any decisions had been made to change the name of Earthmoving to ATWA. As to the argument that the notice of resolution had been prepared on 14 March and presented to the office of the Commission on 16 March 1983, Bryson J found it to be "improbable that this document was signed as early as 14 March 1983 and it is improbable that there was any project of changing the name of PTSEMD to ATWA on or before 16 March 1983". Bryson J also reached the following conclusion:

> I could not on the evidence find that Mr. Smith had the same intention and belief as hereinafter I find that Mr. Mathieson had that PTS and the bank should enter into legal relations with a newly formed company named ATWA. Plainly Mr. Smith did not have that intention, and he did not have any intentions which coincided with those of Mr. Mathieson. The probability is and I find that it was well known to Mr. Smith that there was no newly formed company of that name, and that no company bore that name. Mr. Smith did not intend that PTS and the bank should enter by the mortgage into legal relations with PTSEMD. It is improbable that any project of changing the name of PTSEMD to ATWA then existed and I find that no such project then existed.

The conclusions reached by Bryson J did not necessarily conclude the matter against the respondent. But the appellants had in their favour important findings of fact adverse to Westpac's claim that there had been a meeting of Earthmoving and that at that meeting a

decision had been made to change the name of the company to ATWA. The appellants contended that, in the light of those findings, there was no basis upon which Mahoney JA could hold as he did, when he said:

> I am satisfied that Mr. Smith and those acting for Earthmoving determined that Earthmoving should be the company to enter into the transaction before 16 March 1983. The significant evidence in this regard is, in my opinion, that relating to the change of name of Earthmoving to ATWA.

In the appellants' submission, Mahoney JA could have reached this conclusion only by ignoring findings of fact made by the trial Judge, findings that depended in very large part upon the trial Judge's view of the credibility of witnesses. What Mahoney JA did, the appellants complained, was to approach the appeal as if he were a trial Judge making findings of fact, uninfluenced by what had gone before, and by engaging in "detective work" in regard to the documents. The answer made by Counsel for the respondent was that this was to misunderstand the position. All that Bryson J had done was to disregard any oral evidence suggesting that there had been a meeting of Earthmoving on 4 March 1983 at which a decision was taken to change the name of the company to ATWA. Counsel's submission was that, as a consequence, the oral evidence left that matter quite neutral and that it was therefore entirely appropriate for the Court of Appeal to embark on an investigation of the documents with a view to seeing whether or not they supported Westpac's contention regarding the meeting.

The document at the heart of this dispute is Exhibit L, a form issued by the Commission, identified as Companies Form 24 and headed notice of resolution. The document purports to relate to Earthmoving and to record that on 4 March 1983, at a general meeting of the members of the company, a special resolution was agreed to in the terms already noted:

> That the name of the company be changed from Premium Tyre Service (Earth Moving Division) Pty. Ltd., to ATWA Trading Pty. Ltd.

The document bears date 14 March 1983 and carries the signature of Mr. Smith as director.

There are other features of the document that require consideration but first something needs be said as to the way in which it was introduced into evidence and the use that was made of it at the hearing before Bryson J. Exhibit L, along with a number of other documents, was tendered without objection during the opening of Counsel for the appellants. The only reference made to the document during evidence was during the examination-in-chief of Mr. Smith. He identified the signature on it as his, said that he signed the document "Approximately March 1983, I think, approximately" and said that he was a director of Earthmoving at the time. Then followed these questions and answers:

> Q. And were you a director of Premium Tyre Service (Earth Moving Division) Pty Ltd?
>
> A. Yes, I was.
>
> Q. And were you involved on behalf of that company or ATWA Trading Pty Ltd as it became known in communications with Westpac Bank as to finance facilities?
>
> A. Yes, I was.
>
> Q. And in particular you communicated with Mr Mathieson I take it?
>
> A. Yes, I did.
>
> Q. Did, if I can call it ATWA, being the company that is referred to in Exhibit L in front of you, did ATWA obtain finance facilities from the bank?

A. ATWA did, yes.

A short time later, still in examination-in-chief, Exhibit L was referred to Mr. Smith again and he was asked to note that at the foot of the document there was the name of a firm of accountants, H. Charles & S.C. Brigden, who, he said, once acted as accountants for Earthmoving. He was then asked:

Q. At some time did another firm, C.K. Millar, Son & Partners, take over as accountants?

A. They did, yes.

The name H. Charles and S.C. Brigden, together with an address and telephone number, is typed at the foot of the document where provision is made for identification of the person lodging the form. However, lines have been drawn through this information and the name of C.K. Millar, Son & Partners, together with an address and telephone number, have been substituted in handwriting.

The use made of Exhibit L by the Court of Appeal may be seen from the following passage in the judgment of Mahoney JA which it is necessary to set out in some detail:

> there is before the Court a form of 'notice of resolution' to the National Companies and Securities Commission stating that at... a general meeting on 4 March 1983 such a resolution was passed. The notice bears dated 14 March 1983. It bears a formal stamp indicating that it was presented to the Commission on 16 March 1983. And there is in evidence a receipt given by the Commission dated 18 March 1983 which, Mr. White has accepted, relates to the notice of resolution to which I have referred ...
>
> I am satisfied that the notice of resolution was prepared on or about 14 March 1983 and was lodged on 16 March 1983. That does not, of course, establish beyond question that the general meeting of 4 March 1983 there referred to was in fact held.... But, in my opinion, the evidence before the Court does not establish that the meeting was not held. In all the circumstances, the probability is that such a meeting was held and, in my opinion, it is proper so to find.
>
> On that basis, it is clear that, prior to the date of execution of the mortgage, Earthmoving had been selected as the company to be a party to the transaction with [PTS] and the bank.

It is not the case, even accepting Exhibit L at its face value, that the document was lodged on 16 March; it carries the notation that it was lodged on 27 July. But the document does carry a stamp bearing the word "Presented" and containing, in handwriting, the date "l6 March 1983". Now one can readily understand that, with a document recording a change of name of a company, there would be a time lapse between the lodging of the document and its approval by the Commission. There may be a question, for instance, as to the availability of the proposed new name. In the present case, it appears from Exhibit L that approval of the change of name operated from 27 July 1983. The document bears another date "17 August 1983" by rubber stamp which was not satisfactorily explained. However, there is a letter (Exhibit AV) from C.K. Millar, Son & Partners to Westpac, dated 17 August 1983, the opening paragraph of which reads:

> We are please to enclose a certificate of incorporation on change of name of company, certifying the change of name of Premium Tyre Service (Earthmoving Division) Pty. Ltd., to ATWA Trading Pty. Ltd. The change of name is effective as from 27 July 1983.

At the risk of falling into the same trap of which the Court of Appeal stands accused, we observe that the date "17 August 1983" on Exhibit L is in all likelihood the date on which the certificate of change of name became available.

But Counsel were not able to tell the Court the significance of the stamp "presented", in particular whether there was any practice of the Commission involving the presentation of such a document before it was actually lodged. The transcript of argument before the Court of Appeal shows that Counsel then appearing for the present appellant contested that the form was "Presented" to the Commission on 16 March, adding:

> There was no evidence as to the meaning of the stamp presented.

He did accept that the number 004246 handwritten on Exhibit L was the same number appearing on a receipt issued by the Corporate Affairs Commission on 18 March 1983, recording receipt of a cheque for $61. The receipt, which is Exhibit 29, was tendered by the appellants in the course of cross-examination of Mr. Smith. It bears the name H. Charles & S.C. Brigden with an address (though these particulars have been crossed out) and records that the amount of $61 related to Premium Tyre Service (Earthmoving Division) (presumably Pty. Ltd.). Senior Counsel for the respondent offered an explanation for the fact that Exhibit L records receipt of an amount of $55 and Exhibit 29 an amount of $61. The reconciliation was said to be that a filing fee on a Form 24 was $50, the cost of a copy of a Certificate of Incorporation on Change of Name of Company was $5 and stamp duty on the issue of such a certificate was $6. "So", it was said by Counsel, "it is understandable ... that the Commission would note $55 on this document, but yet take $61 from the presenter of the document.

When the two documents are taken together, in the light of the explanation just mentioned and the concession by then Counsel for the present appellants that Exhibit 29 and Exhibit L are related, it seems that some relevant document was "presented" to the Commission on 16 March 1983. But the conclusion of the Court of Appeal that the notice of resolution was "lodged" on 16 March is contrary to the evidence. On the respondent's case, the difference between presenting Form 24 and lodging it was of no consequence; what was important was that on 16 March 1983 there must have been in existence a document recording at least an intention to change the name of Earthmoving to ATWA. It may be accepted that some form relating to one of the companies with which Mr. Smith was associated was in existence on 16 March. But neither the two documents nor the evidence and explanation offered for them required or warranted a conclusion that there was in March 1983 a meeting of Earthmoving at which it was resolved to change the company's name.

That of course does not dispose of the matter. In that regard, Mahoney JA said:

> But even if the general meeting of Earthmoving was not held on 4 March 1983 the fact that the notice of resolution was prepared and filed as it was indicates, in my opinion, that the decision had been made by Mr. Smith on behalf of Earthmoving that it should be the company to be party to that transaction. The significance of the fact that the meeting was not in fact held and the effect of that upon the change of name would then require consideration. But, having found that the meeting was held, it is not necessary to pursue those matters.

But, if the conclusion by the Court of Appeal that there was a meeting on 4 March 1983 at which Earthmoving resolved to change its name to ATWA cannot be sustained or, perhaps more in point, if there was no warrant for interfering with the contrary conclusion reached by the trial Judge, a number of questions do arise for consideration. Because the grant of special leave to appeal was "limited to the question of the Court of Appeal's departure from the findings of fact of the Court below", these questions were not explored before this Court. It may be noted though that Bryson J reached the following conclusion:

> The terms of Ex AA [an internal memorandum from Mr. Mathieson] show that in Mr. Mathieson's understanding on 25 March 1983 the company the credit of which was to be supported by a mortgage recently granted or to be granted by PTS over its property at Princes

> Highway Dapto was some company which could not be PTSEMD. It would be inconsistent with his repeated references to new formation of a company, newly formed but by 25 March 1983 already formed, that Mr. Mathieson should have had in his mind a company which had been in existence for some years and had either recently changed its name to ATWA Trading Pty. Ltd., or was in the process of doing so.

It may be noted also that, later in his judgment, Bryson J said in relation to the alleged special resolution of Earthmoving on 4 March 1983 and the certificate relating thereto:

> There is no evidence that Mr. Mathieson or any other bank officer saw or knew of [that] resolution or certificate on or before 16 March or indeed at any other later time that might be relevant.

There are a number of matters that the Court of Appeal found it unnecessary to deal with because of the view it took regarding the change of name of Earthmoving. On the appellants' side, there are questions relating to the scope and operation of s. 51A of the Conveyancing Act 1919 (NSW), the indoor management rule for which see *Northside Developments Pty. Ltd. v. Registrar-General* [1990] 170 CLR 146 and issues relating to mistake. For its part, Westpac raised a claim of estoppel which was described by Mahoney JA in this way:

> Its claim is, essentially, that, whatever the deficiencies in the mortgage and the transaction underlying it, [PTS] was at all relevant times aware that moneys were being advanced to ATWA for the purpose of the transaction, that it had given a mortgage to support the transaction, and that therefore it is estopped from contesting the effectiveness of that security for those advances.

Mahoney JA said that there was "force" in the submission but, again, it was unnecessary for the Court of Appeal to deal with that argument, having regard to its finding as to the meeting.

Clearly then, if the appellants are entitled to succeed on the limited basis on which special leave was granted, the matter must go back to the Court of Appeal to deal with the outstanding arguments on both sides.

On a number of occasions this Court has spoken of the importance to be attached by an appellate Court to findings of fact made by a primary Judge, particularly where those findings derive from a conclusion as to the credibility of witnesses. In *Whereat v. Duff* [1973] 47 ALJR 540, at p. 542, Barwick CJ, with whom the other members of the Court agreed, said of a judgment in the Court of Appeal:

> For my part, I found his Honour's reasons unconvincing, but perhaps more importantly, they indicated a radical departure from basic principle, in that the question for the Court of Appeal was not adverted to, namely, whether the positive finding of the primary Judge was erroneous and ought to be disturbed. That finding, in my opinion, was in truth ignored. It was a finding for the defendant formed upon a view as to the credibility of witnesses. There were no exceptional features which would warrant the overturning of such a finding. I am clearly of opinion that it ought not to have been disturbed.

And, more recently, in *Baumgartner v. Baumgartner* [1987] 164 CLR 137, at pp. 145-146 Mason CJ, Wilson and Deane JJ said:

> It is apparent that the learned trial Judge was not disposed to accept the respondent as a credible witness where her evidence was in conflict with that of the appellant. And those conflicts, though comparatively few, were central to the respondents case, that there was a common actual subjective intention to create a trust. In this situation it was not a legitimate exercise for an appeal Court to ignore those conflicts and the way in which the primary Judge

resolved them and to draw inferences from the surrounding area of common ground between the parties, when the primary Judge's resolution of the central issues was adverse to the existence of such an intention.

A note in the Australian law journal [1991] 65 Australian Law Journal 357 refers to a recent decision of the English Court of Appeal in *Winter v. Boynton* delivered on 1 February 1991, reported in *The Times* (London), 6 February 1991 in which the Court spoke of a "growth industry" among English Counsel to challenge findings as to the credibility of witnesses which, the Court of Appeal said, should be "strongly" discouraged. Without necessarily suggesting that such an industry exists in this country, any tendency thereto should receive no encouragement from appellate Courts. The approach taken by the Court of Appeal in the present case is open to the criticism made in *Whereat v. Duff* and *Baumgartner v. Baumgartner*, namely, that the Court ignored an express finding by Bryson J that it was "quite improbable" that there was ever any meeting or resolution of Earthmoving as alleged. The Court of Appeal did not place this finding in the scales along with other relevant material. Rather, it put the finding to one side and, on its own initiative, reached a conclusion that a document, recorded as having been lodged on 27 July 1983, was in fact lodged with the Commission on 16 March 1983.

Even if the "detective work" of which the appellants complained justified that conclusion by the Court of Appeal (which it did not), it did not warrant a further conclusion that a meeting had been held to change the name of Earthmoving or that Westpac had in mind, at the time of the mortgage, a company that had recently changed its name to ATWA. It established nothing more than that some such document was in existence on 16 March 1983, a document in all probability brought into existence by Mr. Smith whose evidence was thoroughly discredited. There was no warrant for setting aside the finding of Bryson J that it was quite improbable that there was ever any such meeting or resolution. The Court of Appeal did not reject his Honour's assessment of credibility and the appeal to the Court of Appeal should have been determined on the basis of that assessment, making it necessary for the Court to deal with the other issues raised by the parties.

This appeal should succeed on the ground to which the grant of special leave confined it and the matter should be remitted to the Court of Appeal to be dealt with in accordance with these reasons:

McHugh J:

Subject to what appears below, I agree with the reasons for judgment of the Chief Justice.

On a number of occasions in recent times, this Court has emphasised the need for appellate Courts to exercise restraint in reversing trial Judges findings of fact, particularly where questions of credibility are involved. But, if the true effect of Exhibits L and 29 had been drawn to the learned trial Judge's attention in the present case, I think that he would not have found that it was "improbable that this document was signed as early as 14 March 1983 and it [was] improbable that there was any project of changing the name of PTSEMD to ATWA on or before 16 March 1983". When the effect of Exhibit 29 is understood, it establishes beyond question that Exhibit L was "presented" to the Commission on 16 March 1983. That means that, contrary to his Honour's finding, there was on foot by that date a "project of changing the name of PTSEMD to ATWA". Once that conclusion is reached the case wears a very different complexion, and the ultimate findings of the trial Judge cannot stand.

As the analysis of the Chief Justice shows, on 16 March 1983, when the equitable mortgage was executed, both Mr. Smith and Westpac had a common intention and belief that Westpac should enter into a legal relationship with the legal entity known as ATWA. That is enough to dispose of the appeal, irrespective of whether any resolution was passed or any meeting took place on 4 March 1983.

The appeal should be dismissed.

Also found at [1992] 1 CLJ 609